

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SMC CORPORATION,)	
)	
Plaintiff,)	
vs.)	NO. 1:00-cv-01095-LJM-VSS
)	
PEOPLESOFT USA INC,)	
)	
Defendant.)	

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PEOPLESOFT U.S.A., INC.,)	
Defendant.)	

ORDER ON DEFENDANT’S MOTION TO DISMISS COUNTS IV THROUGH VIII

This matter is before the Court on the motion of defendant, PeopleSoft U.S.A., Inc. (“PeopleSoft”), to dismiss Counts IV through VIII of the Third Amended Complaint of plaintiff, SMC Corporation (“SMC”). PeopleSoft argues that Counts IV through VIII are purely derivative of Count III (“SMC’s fraud claim”), dismissed by the Court on March 15, 2004. For the reasons discussed herein, PeopleSoft’s motion to dismiss is **GRANTED** as to all Counts.

I. FACTUAL & PROCEDURAL BACKGROUND

For purposes of this motion, the Court accepts the following well-pleaded factual allegations from the complaint as true. This action arises out of events surrounding a software license agreement between two commercial entities. Comp. ¶¶ 1, 2-3, 10-11. In addition to breach of contract and promissory estoppel claims, Comp. ¶¶ 27-35, 36-43, SMC alleges, generally, that PeopleSoft promised SMC the PeopleSoft software (the “Software”) could be installed timely and perform effectively with the hardware, operating system, and database (collectively, the “Platform”) SMC was using at the time. Third Am.

Comp. ¶¶ 11, 15, 45. SMC refers to “statements [PeopleSoft] made to SMC at meetings and elsewhere, regarding the successful implementation of the PeopleSoft software on the [Platform].” *Id.* ¶ 56. More specifically, SMC alleges that: PeopleSoft represented that (a) it was committed to ensuring that SMC and all of its customers would be successful in implementing the PeopleSoft ERP software to the AS400 Platform; (b) it had been very successful in working closely with IBM to optimize the performance of this system; and (c) it was unaware of any unreasonable performance issues with its software on the AS400 Platform. PeopleSoft, by and through the actions of its Global Business Development Manager, Tony Goolsby, made these representations in an electronic mail message which was forwarded to Matt J. Lawrence of SMC by Marc Berman of PeopleSoft on September 18, 1998. Mr. Goolsby had full authority to make these representations on behalf of PeopleSoft. *Id.* ¶¶ 46-47. SMC further specifically alleges that: Additionally, in signing the Agreement of September 23, 1998, PeopleSoft through the actions of its Regional Vice President, James J. Prekop, who signed the Agreement, made a material misrepresentation of a past or existing fact when it represented to SMC that (a) the PeopleSoft software could be implemented on SMC’s AS400 Platform; and (b) PeopleSoft was committed to supporting the implementation of its software on the AS400 Platform. Mr. Prekop had full authority to make these representations on behalf of PeopleSoft and to sign [sic] this Agreement on behalf of PeopleSoft, which then became bound to his representations and this Agreement. *Id.* ¶ 48.

These alleged statements are important because, SMC alleges, PeopleSoft knew at the time it made them that the Software did not work as PeopleSoft said it would and that the Software could not effectively be implemented on the Platform. *Id.* ¶ 53. SMC alleges that PeopleSoft had this knowledge because other Software licensees had encountered similar problems and these other licensees, even with

PeopleSoft's help, were not able to solve the problems. *Id.* ¶ 54. SMC alleges PeopleSoft made these statements to SMC for the purpose of inducing SMC to rely on the statements. *Id.* ¶ 57. SMC relied on the statements by entering into a software licensing agreement ("Agreement"), whereby SMC paid several million dollars to PeopleSoft. *Id.* ¶ 50. According to SMC, the Software was not compatible with the Platform and did not function as promised. *Id.* ¶ 22.

On August 1, 2003, PeopleSoft filed a Motion to Dismiss SMC's fraud claim. On March 15, 2004, the Court issued an Order granting PeopleSoft's Motion. SMC then filed a Motion for Leave to File a Fourth Amended Complaint on March 25, 2003, which the Court denied on May 6, 2004. On August 6, 2004, the Court also denied SMC's Motion to Reconsider the March 15 and May 6, 2004, Orders, and granted SMC's motion to amend the Court's orders to the extent that the allegations in the Third Amended Complaint fraud claim are not stricken as to the remaining Counts of the Complaint.

II. STANDARD

Peoplesoft seeks to dismiss Counts IV through VIII under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") for failure to state a claim upon which relief can be granted. When ruling on a motion to dismiss for failure to state a claim, pursuant to Rule 12(b)(6), the Court accepts as true all well-pleaded factual allegations in the complaint and the inferences reasonably drawn from them. *See Baxter by Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 730 (7th Cir. 1994). The Court can consider the facts alleged in the complaint as well as documents attached to or incorporated into a complaint when reviewing under a motion to dismiss standard. *See Albany Bank & Trust Co., v. Exxon Mobil Corp.*, 310 F.3d 969, 971 (7th Cir. 2002). Dismissal is appropriate only if it appears beyond doubt

that plaintiff can prove no set of facts consistent with the allegations in the complaint that would entitle it to relief. *See Hi-Lite Prods. Co. v. Am. Home Prods. Corp.*, 11 F.3d 1402, 1405 (7th Cir. 1993). This standard means that if any set of facts, even hypothesized facts, could be proven consistent with the complaint, then the complaint must not be dismissed. *See Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1995).

Further, plaintiff is “not required to plead the particulars of [its] claim[s],” *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994), except in cases alleging fraud or mistake where plaintiffs must plead the circumstances constituting such fraud or mistake with particularity. *See Fed. R. Civ. P. 9(b); Hammes*, 33 F.3d at 778. “Particularity” requires plaintiffs to plead the who, what, when, where, and how of the alleged fraud. *See Ackerman v. N.W. Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999); *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.1990). Finally, the Court need not ignore facts set out in the complaint that undermine Plaintiff’s claims, *see Homeyer v. Stanley Tulchin Assoc.*, 91 F.3d 959, 961 (7th Cir. 1996) (*citing Am. Nurses’ Ass’n v. State of Illinois*, 783 F.2d 716, 724 (7th Cir. 1986)), nor is the Court required to accept Plaintiff’s legal conclusions. *See Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996); *Gray v. Dane County*, 854 F.2d 179, 182 (7th Cir. 1988).

III. DISCUSSION

PeopleSoft, pursuant to Rule 12(b)(6), moves to dismiss Count IV through VIII of the Third Amended Complaint filed by SMC for failure to state a claim upon which relief can be granted. Mot. ¶

1. Peoplesoft seeks dismissal of claims that are derivative of SMC’s fraud claim (Count III) that were not

dismissed in the Court's March 15, 2004, Order. Those counts are: unjust enrichment (Count IV), violation of the Indiana Deceptive Consumer Sales Act pursuant to Indiana Code § 24-5-0.5-1 (Count V), civil causes of action for theft by deception pursuant to Indiana Code § 35-43-5-3 (Count VI) and conversion pursuant to Indiana Code § 35-43-4-3 (Count VII), and punitive damages (Count VIII). *Id.* ¶ 2.

When pleading fraud, a plaintiff must allege with particularity the circumstances constituting the fraud. Fed. R. Civ. P. 9(b). Rule 9(b) requires a plaintiff to include the identity of the person who made the misrepresentation, the time, place, and content of the misrepresentation, and the means by which the misrepresentation was made. *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 923 (7th Cir. 1992). The notice pleading standard in Rule 8 of the Federal Rules of Civil Procedure applies to other aspects of a plaintiff's complaint, such as reliance and damages. *See Ind. Bell Tel. Co. v. Ward*, 2002 WL 32067296, at *3 (S.D. Ind. 2002). However, Rule 8 does not relieve a plaintiff of the burden of alleging the particular who, what, when, and where of an alleged fraud. *See M.W. Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1020 (7th Cir. 1992).

The Court dismissed SMC's fraud claim on the merits, as SMC's well-pled allegations (paragraphs 46 through 48) did not state a claim for fraud under Indiana law. The Court held that the purported fraudulent statements were either: statements of opinion (paragraphs 46(b) and 46(c)), future promises that were not "susceptible of 'exact knowledge'" (paragraph 46(a)), or a "recharacterization of [SMC's] breach of contract claim" (paragraph 48). March 15, 2004, Order, at 4-5. The Court also found that other paragraphs in the Complaint (11, 15, 16, and 45) failed to satisfy the pleading requirements under Rule 9(b). *Id.* at 4. PeopleSoft argues that dismissal of the fraud claim rendered Counts IV through VII

of SMC's Third Amended Complaint deficient because Counts IV through VII do not include any factual allegations except those contained within the fraud claim, and dismissal of the fraud claim requires that the Court strike Count VIII for punitive damages. Def.'s Mem. Supp. at 4, 7. The Court addresses each count individually.

A. COUNT IV – UNJUST ENRICHMENT

PeopleSoft contends that the Court should dismiss SMC's claim for unjust enrichment in Count IV because an unjust enrichment claim cannot co-exist when a contract governs the parties' relations. Def.'s Mem. Supp. at 7. Under Indiana law, "[u]njust enrichment operates where there is no governing contract." *DiMizio v. Romo*, 756 N.E.2d 1018, 1025 (Ind. Ct. App. 2001). In other words, when the rights of parties are controlled by an express contract, recovery cannot be based on a theory implied in law. *See Keystone Carbon Co. v. Black*, 599 N.E.2d 213, 216 (Ind. Ct. App. 1992) (internal citation omitted).

SMC argues that it is pleading unjust enrichment in the alternative to its claim that a contract existed between the parties. Pl.'s Resp. at 5-6. The Complaint does not comport with this argument. In Count IV, SMC incorporates by reference all of the allegations in paragraphs one through sixty of the Complaint. In paragraph ten, SMC expressly alleges that a valid contract existed between it and PeopleSoft. Comp. ¶ 10. Accordingly, this express contract allegation is incorporated into SMC's unjust enrichment claims. Furthermore, SMC's Complaint does not allege that the contract is void or otherwise unenforceable. While SMC is entitled under Rule 8(e)(2) to plead the alternative claims of breach of contract and unjust enrichment despite the inconsistency between those claims, SMC's unjust enrichment claim can not include

allegations of a specific contract governing the parties' relationship. *See Vanguard Fin. Serv. Corp. v. R. W. Prof'l Leasing Servs. Corp.*, 1998 WL 774984, at *4 (N.D. Ill. Oct 27, 1998). Accordingly, Count IV is dismissed with prejudice.¹

B. COUNT V – INDIANA DECEPTIVE CONSUMER SALES ACT

PeopleSoft asserts that Rule 9(b) applies to claims that “sound in fraud” or are “grounded in fraud,” and because the Court dismissed SMC’s fraud claim for failure to plead with particularity, the Court should also dismiss SMC’s claim under the Indiana Deceptive Consumer Sales Act (“the Act”), Indiana Code § 24-5-0.5-1 *et seq.* Def.’s Mem. Supp. at 5. SMC argues that it’s complaint correctly pleads a violation of the Act under Rule 8. SMC relies heavily on *McKinney v. State*, 693 N.E.2d 65 (Ind. 1998),² wherein the Supreme Court of Indiana held that an incurable deceptive act claim under the Act is subject to Indiana Rule of Trial Procedure 9(B)). *Id.* at 71. But “Rule 9(B) does not apply to claims based on allegations that the supplier ‘should reasonably know’ of the misrepresentations.” *Id.* Accordingly, SMC argues the facts alleged in the Third Amended Complaint assert that PeopleSoft “should reasonably have known” that its repeated representations to SMC regarding the Software were false, therefore SMC’s

¹ The parties also dispute whether SMC’s claim for unjust enrichment is derivative of the dismissed fraud claim and should be dismissed on that basis. Def.’s Mot. Supp. at 7. The Court need not address this issue as it is dismissing Count IV for failure to comport with alternative pleading requirements.

² PeopleSoft argues that SMC improperly relies on *McKinney*, as this Court, sitting in diversity, is governed not by state trial rules but by the Federal Rules of Civil Procedure. Pl.’s Resp. at 11. However, Indiana Trial Rule 9(B) is identical to Federal Rule 9(b). *McKinney*, 693 N.E.2d at 71. Further, the court’s discussion of the issue was supported exclusively by federal case law that the Court finds instructive. *See id.* at 72.

claim under the Act is governed by the notice pleading standard of Rule 8. Pl.'s Resp. at 12.

However, SMC's Complaint alleges that PeopleSoft made "representations with knowledge that they were false, or with reckless disregard for the truth," and that "PeopleSoft knew that SMC would encounter the same or similar problems when the PeopleSoft software was installed and that SMC would be unable to solve the . . . problems regardless of the efforts of SMC and/or PeopleSoft." Comp. ¶¶ 49, 54. SMC's assertion that the facts alleged in the complaint -- and reasonable inferences drawn from them -- state that PeopleSoft "should reasonably have known" that its repeated representations to SMC regarding the Software were false, is seemingly without support. Pl.'s Resp. at 12. The Complaint alleges knowing representations by PeopleSoft.

Further, PeopleSoft correctly notes that the Act differentiates between "uncured deceptive acts" and "incurable deceptive acts,"³ and where a movant, such as SMC, "[does] not distinguish between its

³ The Act states, in pertinent part:

(6) "Uncured deceptive act" means a deceptive act:

(A) with respect to which a consumer who has been damaged by such act has given notice to supplier under section 5(a) of this chapter; and

(B) either:

(1) no offer to cure has been made to such consumer within thirty (30) days after such notice; or

(2) the act has not been cured as to such consumer within a reasonable time after his acceptance of the offer to cure.

(7) "Incurable deceptive act" means a deceptive act done by a supplier as part of a scheme, artifice, or device with intent to defraud or mislead. . . .

allegations of ‘deceptive acts’ and ‘incurable deceptive acts’ . . . the entire complaint must be judged by Rule 9(B) standards.” *McKinney*, 693 N.E.2d at 73 (1998) (applying Indiana law) (*citing In re Stac.*, 89 F.3d 1399, 1405 n. 2 (9th Cir. 1996) (“[Where Complaint alleged violations of Securities Acts], Rule 9(b) applied to all claims because the gravamen of the complaint was plainly fraud and no effort was made to show any other basis.”) (internal citations omitted)). SMC’s Complaint fails to distinguish between deceptive and incurable deceptive acts, and thus falls under the pleading requirements of Rule 9(b). SMC’s basis for the claim is plainly in fraud and no additional or alternative bases have been plead in the Complaint. *See also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (finding that a claim under the California Consumers Legal Remedies Act and California’s unfair business practice laws, special pleading requirements of Rule 9(b) because the plaintiff averred fraud, even though fraud was not essential element of California statutes upon which he relied, so the claim was “grounded in fraud” or “sounded in fraud”) (*citing Lone Star Ladies Inv. Club v. Schlotzsky’s Inc.*, 238 F.3d 363, 368 (5th Cir. 2001); *In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 315 (8th Cir. 1997)); *Dillon v. Ultrasound Diagnostic Sch.*, Nos. Civ. A. 96-8342, 1997 WL 805216, at *3 (E.D. Penn., Dec. 18, 1997) (finding that claims brought under Pennsylvania Unfair Trade Practices & Consumer Protection Law were governed by Rule 9(b) because the act was aimed at fraud prevention).

Federal Rule 9(b), like its Indiana counterpart, serves the objectives of deterring groundless suits and providing defendants with sufficient information in the complaint to enable them to prepare a defense. *Id.* at 72 (*citing* 5 Charles Alan Wright & Arthur R. Miller, *FEDERAL PRACTICE AND PROCEDURE* § 1296

IND. CODE § 24-5-0.5-2(6)-(7).

(2d ed. 1990)). It was necessary that SMC plead that PeopleSoft committed a “deceptive act done . . . as part of a scheme, artifice, or device with intent to defraud or mislead.” IND. CODE § 24-5-0.5-2(7). But under the standards of Rule 9(b), as indicated by the Court’s March 15, 2004, Order, the Complaint is deficient. The purported fraudulent statements were either: statements of opinion (paragraphs 46(b) and 46(c)), future promises that were not “susceptible of ‘exact knowledge’” (paragraph 46(a)), or a “recharacterization of [SMC’s] breach of contract claim” (paragraph 48). March 15, 2004, Order, at 4-5. Other paragraphs in the Complaint (11, 15, 16 and 45) also failed to satisfy the pleading requirements under Rule 9(b). *Id.* Because the Complaint lacks any allegations charging PeopleSoft with any specific instances of wrongful conduct, SMC has failed to meet the particularity requirement of Rule 9(b). *See Veal v. First Am. Sav. Bank*, 914 F.2d 909, 913 (7th Cir. 1990). In light of the foregoing, SMC’s Claim V, under the Act, is dismissed with prejudice for failure to state a claim with particularity as required by Rule 9(b).

C. COUNTS VI & VII – THEFT BY DECEPTION & CONVERSION

SMC’s claims alleging breach of certain Indiana criminal statutes, theft by deception, Indiana Code § 35-43-5-3 (Count VI), and conversion, Indiana Code § 35-43-4-3 (Count VII), must also be dismissed because those claims stem from the dismissed fraud allegations.⁴ March 15, 2004, Order. Generally, SMC asserts that deception and conversion claims are not subject to Rule 9(b), but the Court finds SMC’s

⁴ Although not noted in the Complaint, it appears that SMC brings these claims under the Indiana Crime Victim’s Relief Act. *See* IND. CODE § 34-24-3-1 (“If a person suffers a pecuniary loss as a result of a violation of IC 35-43 . . . the person may bring a civil action against the person who caused the loss.”).

arguments unpersuasive. Pl.'s Resp. at 7-8.

1. Count VI – Theft by Deception

The Court's dismissal of the fraud claim undermines SMC's theft by deception claim.⁵ The Court has found that the purported fraudulent statements were either: statements of opinion (paragraphs 46(b) and 46(c)), future promises that were not "susceptible of 'exact knowledge'" (paragraph 46(a)), or a "recharacterization of [SMC's] breach of contract claim" (paragraph 48). March 15, 2004, Order, at 4-5. Other paragraphs in the Complaint (11, 15, 16 and 45) also failed to satisfy the pleading requirements under Rule 9(b).

SMC argues that a claim for theft by deception is subject only to Rule 8 notice pleading requirements. (*citing DirecTV, Inc. v. Pruitt*, 296 F. Supp. 2d. 937 (S.D. Ind 2003); *Wehrheim v. Secrest*, IP 00-1328-C-T / K, 2002 WL 31242783 (S.D. Ind., Aug. 16, 2002)). First, *DirecTV* is distinguishable in that it is based on Indiana Code § 35-43-5-6, a criminal statute that does not require proof of any false or deceptive statement. *Id.* at 944. Rather, proof that a person intercepted signals without paying for them was sufficient to establish the violation, and presumably to trigger civil remedies under Indiana Code § 34-24-3-1. *See Id.* Here, under Indiana Code § 35-43-5-3(a)(2), the making of a fraudulent statement is an element of the crime, requiring that an individual "knowingly or intentionally mak[e] a false or misleading written statement. . . ." *Id.* With regard to SMC's citation of *Wehrheim*,

⁵ Theft by deception is "knowingly or intentionally mak[ing] a false or misleading written statement with intent to obtain property, employment, or an educational opportunity." IND. CODE § 35-43-5-3(a)(2).

Seventh Circuit Rule 53 establishes that unpublished orders and opinions may not be cited as precedent in any document filed in any court within the Seventh Circuit, which clearly applies to this Court and to SMC's Response. In any event, *Wehrheim* is distinguishable because the plaintiff's theft by deception claim in *Wehrheim* was not, as is the case here, based solely upon a dismissed fraud claim.

SMC also argues that the offense of theft by deception "has different elements from fraud since it requires proof of a false or misleading *written* statement, . . . [whereas] a claim of fraud only requires a false, material representation of past or existing fact." Pl.'s Resp. at 8 (*citing Ecker v. Rochester Ford New Holland, Inc.*, 694 N.E.2d 289, 292 (Ind. Ct. App. 1988) (emphasis in original)). Because the Court already has dismissed the fraud claim, the presence of an additional element -- a writing -- is inconsequential, as SMC has failed to show a false, material representation of past or existing fact.

In support of their Motion to Dismiss the theft by deception count, PeopleSoft cites *McConnell & Sons, Inc. v. Target Data Systems, Inc.*, 84 F. Supp. 2d 980, 987 (N.D. Ind. 2000), a case particularly on-point. In *McConnell*, the court dismissed a fraud claim at the pleading stage because, as here, the conduct complained of did not establish fraud. *Id.* at 985-86. The *McConnell* court then dismissed a conversion and theft by deception claim because the allegations in the predicate fraud claim were dismissed. *Id.* at 987. The court explained that "[t]he sum and substance of defendant's allegations of criminal statutory violations rest upon its contention that the plaintiff committed fraud," and therefore, dismissal of the fraud-dependent claims was proper. *Id.* Likewise, SMC's fraud-dependent claims fail. Without the fraud claim, the Complaint is devoid of any allegations as to PeopleSoft's knowing or intentional actions. The Court dismisses SMC's theft by deception claim with prejudice.

2. Count VII – Conversion

It is also clear, upon review of the Complaint, that the conversion claim rests upon SMC's contention that PeopleSoft engaged in a fraud.⁶ Again, in support of their Motion to Dismiss the conversion count, the Court finds *McConnell*, where a theft by deception claim was wholly based on allegations in a dismissed fraud claim, to be particularly on point, and the Court follows its reasoning.⁷ *McConnell*, 84 F. Supp. 2d at 987. The sum and substance of SMC's allegations of deception rest upon its contention that PeopleSoft committed fraud, so this claim must be dismissed. *See Id.*

SMC relies on *Marcano v. Northwestern Chrysler-Plymouth Sales, Inc.*, 550 F. Supp. 595 (N.D. Ill. 1982), for the proposition that since “[f]raud and conversion are two separate torts and, even though present in the same transaction, each is subject to separate pleading rules.” *Id.* at 603. But *Marcano* also states that when a conversion claim involves fraud, “the fact that a particular act of conversion was fraudulent subjects only the allegations specifically relating to fraud and not the entire case to the Rule 9(b) particularity requirements.” *Id.* Here, SMC's conversion claim rests entirely upon the dismissed fraud count.⁸ While fraud is not an essential element of a claim of conversion, without the fraud

⁶ Conversion, under Indiana law, is “knowingly or intentionally exert[ing] unauthorized control over the property of another. . . .” IND. CODE § 35-43-4-3.

⁷ SMC argues that *McConnell* does not apply to cases where facts are alleged constituting constructive fraud. Pl.'s Rep. at 9 (*citing McConnell*, 85 F. Supp. 2d. at 985). However, even a liberal reading of the complaint does not present an allegation of constructive fraud. This argument also is contrary to the express allegations of the Complaint. Simply stated, Count III, dismissed by the Court, was for fraud, not constructive fraud.

⁸ SMC also argues that its Complaint contains allegations of non-fraudulent actions that constitute theft by deception and conversion. However, this position is contrary to the express allegations in the Complaint.

claim, the Complaint sets forth no other allegations that PeopleSoft knowingly or intentionally exerted unauthorized control over SMC's property. *See* IND. CODE § 35-43-4-3. *See also* *Manzon v. Stant Corp.*, 138 F. Supp. 2d 1110, 1115 (S.D. Ind. 2001) (*citing* *Midland-Guardian Co. v. U. Consumers Club, Inc.*, 499 N.E.2d 792, 797-98 (Ind. Ct. App. 1986)). Moreover, the Court agrees with PeopleSoft that where a defendant (such as PeopleSoft) believes it has a contractual right to the property at issue, the *mens rea* requirement is defeated and plaintiff cannot state a claim for conversion. Def.'s Rep. at 5 (*citing* *Manzon v. Stant Corp.*, 138 F. Supp. 2d 1110, 1116-17 (S.D. Ind. 2001)). Unlike a breach of contract claim, criminal intent is an essential element of an action for conversion. *See NationsCredit Comm. Corp. v. Grauel Enterp., Inc.*, 703 N.E.2d 1072, 1078 (Ind. Ct. App. 1998).

As the drafter of the claim, SMC is the master of its pleading. *See, e.g., Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1075 (7th Cir. 1992). SMC can, as such, plead itself out of court by pleading assertions that undermine its claim. *See Henderson v. Sheahan*, 196 F.3d 839, 845 (7th Cir. 1999). Because the sum and substance of SMC's conversion claim rests upon its contention that PeopleSoft committed fraud, which the Court has plainly rejected in the March 15, 2004, Order, and in the absence of any allegation that PeopleSoft had the requisite *mens rea*, SMC's conversion claim must be dismissed with prejudice.

D. COUNT VIII – PUNITIVE DAMAGES

Dismissal of Counts III through VII of the Complaint requires that the Court strike SMC's punitive damage claim. Indiana law does not authorize the recovery of punitive damages in a breach of contract action. *See Don Webster Co., Inc. v. Ind. W. Express, Inc.*, 186 F. Supp. 2d 958, 962 (S.D. Ind. 2002)

(quoting *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 981 (Ind. 1993)).

Absent the existence of an independent tort action that allows for punitive damages, they are unavailable.

See *Don Webster Co.*, 186 F. Supp. 2d at 962. Accordingly, and in the absence of an independent tort,

SMC cannot state a claim for punitive damages and Count VIII also is dismissed with prejudice.

IV. CONCLUSION

For all of the reasons discussed above, PeopleSoft's motion to dismiss Counts IV, V, VI, VII, and VIII of the Third Amended Complaint is **GRANTED**.

IT IS SO ORDERED this 12th day of October, 2004.

LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

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